U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHESTER R. JONES, JR. and DEPARTMENT OF THE ARMY, AUDIT AGENCY, Falls Church, VA

Docket No. 01-1034; Submitted on the Record;
Issued June 18, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

This case has been before the Board before. On October 3, 1977 appellant, then 46 years old, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he sustained injuries to his left hip, shoulder, head and back as a result of being struck by a car while walking in a parking lot as part of his federal employment. Appellant also filed a notice of traumatic injury on August 15, 1983, wherein he stated that he injured his back when attempting to move office furniture. Appellant underwent numerous surgeries on his lower back.

The Office accepted that appellant's surgeries were from the effects of his employment injuries and paid appellant compensation for temporary total disability during his absences from work. Appellant retired on disability on September 1, 1984 but elected to receive compensation under the Federal Employees' Compensation Act in lieu of retirement benefits under the Civil Service Retirement Act. The Office then paid appellant compensation for temporary total disability from March 23, 1984 to July 31, 1990 and thereafter placed appellant on the periodic rolls for continuing compensation.

By decision dated September 30, 1994, the Office terminated appellant's compensation benefits, effective September 18, 1994, for the reason that appellant was capable of performing his preinjury job. This decision was affirmed by a hearing representative on January 26, 1995 and on reconsideration on April 24, 1995. The Board, in its decision dated June 5, 1998, reversed these decisions and determined that the Office had not met its burden of proof in terminating benefits.[1]

[1] *Chester R. Jones, Jr.*, Docket No. 95-2445 (issued June 5,1998).

Additional evidence was submitted and on August 2, 1999 the Office issued a notice of proposed termination of benefits. The Office determined that the weight of the medical evidence of record failed to support that appellant was totally disabled from performing the duties of an Equal Employment Opportunity specialist. The Office also noted that the medical evidence failed to demonstrate the need for continued aquatic therapy. By letter dated September 3, 1999, the Office made the proposed termination of compensation benefits final.

By letter dated September 12, 2000, appellant requested reconsideration. In support thereof, he submitted a letter dated August 18, 2000, wherein Dr. Christopher J. Duke, a Board-certified internist, stated that appellant was "chronically disabled by low back pain from failed back syndrome. He requires ongoing care from various specialists and from me. His benefits should be continued indefinitely." Appellant also submitted a medical report and work capacity evaluation dated June 14, 1999 from Dr. Arthur Kobrine, a Board-certified neurosurgeon, who noted that appellant had residuals of previous lumbar laminectomies and cervical spondylosis. However, he found that appellant was "certainly capable of sedentary type work." Dr. Kobrine continued:

> "It is my opinion that the patient does not require any outside therapy at this time but should be maintained on a home exercise program. He certainly is capable of driving to an office type setting since he drives now and performing the type of work he appears to have been performing as of 1991, namely that of an equal employment specialist."

By decision dated December 13, 2000, the Office denied appellant's request for reconsideration. The Office found that appellant's request was not timely filed and failed to establish clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As once such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant's case

[2] 5 U.S.C. § 8128(a).

for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.[3] To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[4] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[5] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[7] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[8]

In the case at hand only the September 12, 2000 decision is properly before the Board as appellant first requested review of the Office's decision by letter of September 12, 2000 and received by the Office on September 21, 2000. As this letter was filed over one year after the September 3, 1999 decision terminating benefits, the Office reviewed the request for reconsideration under the clear evidence of error standard. Neither of the medical opinions submitted by appellant shows clear evidence of error. In its September 3, 1999 decision, the Office found that the evidence failed to support that appellant was totally disabled from performing the duties of an equal employment opportunity specialist. The new opinion of Dr. Kobrine cannot establish clear evidence of error, as he clearly stated that appellant was capable of sedentary-type work, including the position he held in 1991 of equal employment specialist. With regard to the August 18, 2000 opinion of Dr. Duke, he simply states that appellant was chronically disabled by low back pain from failed back syndrome, that he required ongoing care from various specialists and that his benefits should be continued indefinitely. This opinion was not a well-reasoned and rationalized opinion because, *inter alia*, it did not state why Dr. Duke believed that appellant was chronically disabled or mention specific tests indicating total disability, it did not indicate that the physician had any understanding as to appellant's job duties and it did not state whether appellant's current low back condition was caused by his employment. Accordingly, appellant failed to establish that he filed a timely claim or that the Office's decision showed clear evidence of error.

[3] 20 C.F.R. § 10.607.

[4] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 776, 770 (1993).

[5] *Jimmy L. Day*, 48 ECAB 652 (1997).

[6] *Id.*

[7] *Id.*

[8] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The December 13, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.[9]

Dated, Washington, DC
June 18, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal. 20 C.F.R. § 501.3(d). Since appellant filed this appeal on March 13, 2001, the only decision that the Board has jurisdiction over is the December 13, 2000 decision denying reconsideration.